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IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

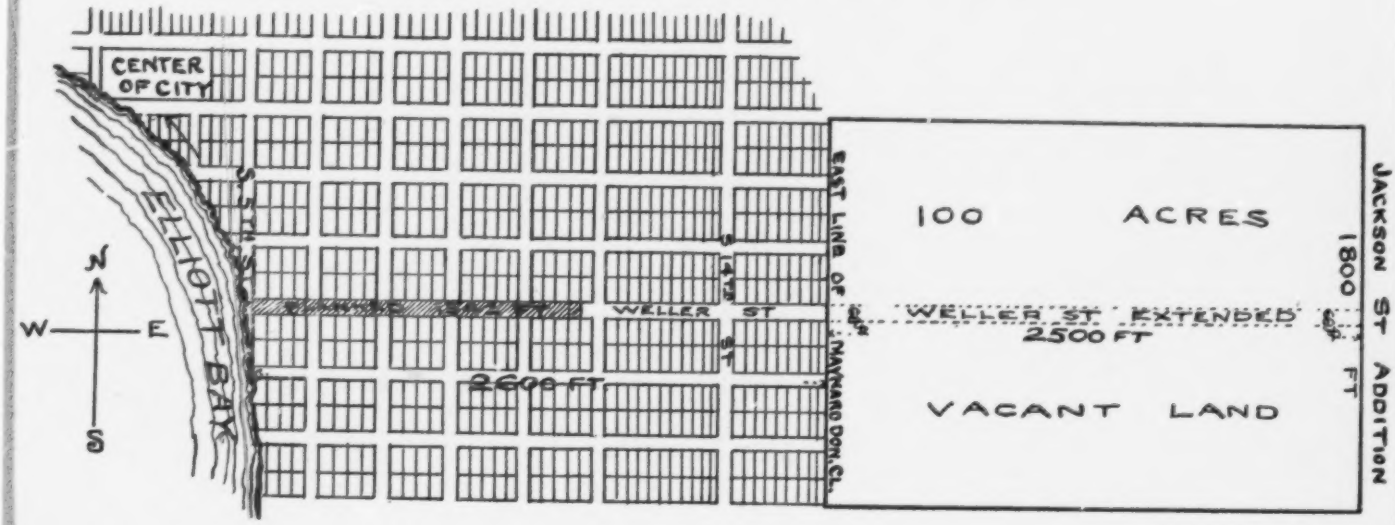
No. 274.

CITY OF SEATTLE, *Appellant,*

vs.

DANIEL KELLEHER, as Administrator of the Estate of JOHN W. THOMPSON, *Appellee.*

BRIEF OF APPELLEE.


CENTER OF CITY
ELLIOTT BAY
N
W
E
S
WELLER ST
2600 FT
EAST LINE OF E½ MAYNARD DON. CL.
100 ACRES
WELLER ST EXTENDED
2500 FT
VACANT LAND
1800 FT
JACKSON ST ADDITION

STATEMENT OF THE CASE.

We have inserted at the opening of this brief a diagram showing the location of the property to enable the court to follow the argument.

Thompson, the deceased, owned in Seattle a tract of 100 acres, which he had got by foreclosure from one Snipes, who, in turn, had got it from a certain Hill. As the city is seeking to bind Thompson for things done in the time of Hill, it is necessary to go back to that time. Hill in 1889, while he still owned the tract, wanted it connected with Elliott Bay by the improvement of Weller Street, and for this purpose he applied to the city council. Weller Street at that time did not traverse this tract at all. It merely began at the bay near the centre of the city, that is to say, at South Fifth Street, and, with many ups and downs, wholly unimproved, though open to the public, projected itself eastward until it stopped at the west edge of this 100 acre tract, which was then, and ever since has been, entirely vacant and, in a measure, wild. (41, 42, 70.)

The tract lay east from the bay, considerably higher and about 2600 feet distant (2). Hill's proposal was that the city "grade and extend" (148) Weller Street from the bay to this tract's east boundary, or, in other words, grade it from the bay over the portion of the street already open, and then enter for the first time and cross his tract. Across the tract was a further distance of 2500 feet (3).

This tract of Hill's was at that time unplatted. He had previously, indeed, discussed with the city officials a plat prepared and even acknowledged, but it is clear

that he had deliberately refrained from putting it of public record (69, 99, 102, 112). Meanwhile, his understanding with the officials was that the proposed improvement should be done in a certain way. An easy ascent to the high ground where the tract lay was to be obtained by an ascending bridge or trestle from Fifth to Ninth Streets (88-9, 115).

With this in view, an ordinance, No. 1285 (2, 150), was passed in February, 1890, a contract under it let, and as much as 98,000 feet of lumber put into place on a trestle or elevated roadway, until objections were encountered from property owners between Fifth and Ninth Streets. Hill, for his part, insisted on the project being carried out as it had been agreed on, but about this time he died (88, 89, 149). Then the city abandoned the plan and tore down the elevated roadway. In place of the elevated roadway it laid at the western end of Weller Street, that is to say, at the bay end, *outside of and farthest from Hill's property*, a plank roadway surface for more than 1500 feet (4), the distance from the bay up the slope to about Ninth Street. The street was then graded (but not planked) further east, entered the tract in question, and crossed it until it terminated on its eastern boundary in a ravine (71, 76, 93). Moreover, we must notice that the very ordinance 1285 authorizing the work had ordered "grade" and "sidewalk," but no *planking* (2, 132). In the tract itself there was no habitation, but on the western 1542 feet of the street where the planking had been laid, in other words, on the end next the bay, residences abounded on both sides and property was of much greater value. The whole distance from the bay to Hill's property was about 2600 feet, and consequently the planking terminated about 1000 feet from his tract.

Previous to this improvement being made under ordi-

nance 1285 there was no roadway at all across the 100 acre tract (70). The 66 foot strip across the tract was at that time pasture land in grass and bushes, no different in appearance from the rest of the 100 acre tract. In 1890, under these proceedings, the city entered upon this 66 foot strip, grading it, making heavy cuts in the hills and building wooden sidewalks. Since the improvement was made in 1890, the 66 foot strip across the tract has not been used as a street, either by foot passengers or by teams. The testimony is as follows (70):

"After the improvement was made, for a great number of years it (the 66 foot strip across the 100 acre tract) has been growing up in brush, the sidewalks rotting, the street itself full of holes where sand was taken out and where streams of water ran." Again (76): "The sidewalks there are all old, showing that they are untrodden, and in places they are broken down, the planks (of the sidewalk) are broken off and they are rotten. There are several places where they are absolutely and utterly gone, practically gone; you have to step over them. They were not used to any extent. There are no houses along there and no wagon tracks."

The ordinance for the work as originally planned was passed, we have said, in February, 1890. Hill died in August of that year, and the altered plan under a modified arrangement with the contractor was made in September (4). In March, 1891, the city ordered an assessment (7) to provide for the entire cost of the work, including *planking*, grading, grubbing, and the laying of sidewalks, the effect of which was to lay upon the one hundred acre tract thirty-two per cent of the whole sum to be raised.

Now, this assessment was annulled by the local courts (8, 41) and it was not until later in 1893 (Washington Session Laws 1893, p. 226) that the State Legislature

passed an act authorizing reassessment proceedings (9, 42—VI, 43—XIV); so that until that time no authority whatever existed for reassessment, nor was any reassessment attempted. Yet it was in this interval that new rights intervened. In January, 1892, the tract was purchased by Snipes, and a mortgage simultaneously given by him to Thompson (8). In March following Snipes filed a plat calling the property the "Hill Tract Addition," but in this the mortgagee, absent and a non-resident (65), did not join (9, 64). Here we must recall the plat prepared by Hill in his life time. We must remember that this had never been put of public record, a fact important because it is urged against us here that since the plat, as he had prepared it, contained Weller Street produced into the tract according to the design of the original improvement, Thompson ought to be bound by it. Not only, though, had it not been recorded, but there is no testimony that Thompson had ever heard of it, while he himself swears that it was unknown to him (64). Moreover, at the date of his loan, the land was so assessed by the city for general taxation that the streets of the Hill plat were disregarded and taxed as private property (72). The reason why Hill did not file the plat for public record was that if he did, the streets would become dedicated and the land would be assessed by lots and blocks (99). The city did not regard the streets dedicated, for it continued for several years to tax as private lands this street strip, thus showing conclusively that they did not deem the strip of land a public street (72). In taking his mortgage, Thompson did so by metes and bounds (9).

A law having been passed in 1893 to permit reassessments, the city proceeded to reassess in January, 1894, (10). In doing so it made such changes from the first assessment as raised the proportion due from this tract to

forty-four per cent of the whole (12), notwithstanding that under the first it had been only thirty-two per cent. All the original cost including the planking was reassessed against the abutting property. This is admitted by the pleadings (paragraphs VIII and XVI of complaint, 7, 11, 41, 44, 68, 156). As we have already stated, there was no habitation in the Hill tract, while there were residences on both sides of the street on the planked end, which end had received for 1542 feet the sole benefit of the planking. Now, the first assessment was levied while the city was under a charter dated 1886, the latter under what is called the "Freeholders' Charter" (10). Under the former (4), it is impossible not to notice that the "*opening*, graveling, *planking* and improving" of streets is a charge on *general taxation*, and that it is only paving, grading, and sidewalks that by its next section could have been made a lien by the district plan.

It is accordingly quite plain that the only thing done inside the Hill tract that could have been assessed to it specially was the grading and sidewalk work, while both the assessment and the reassessment charged this land for the planking as well. Moreover, the methods of assessment in the two systems was quite distinct. Under the old (5), the amount was to be assessed against the abutting property according to the value of each abutting piece of property, while under the new the front foot rule was adopted, levying the tax on the abutting property to a depth of 120 feet, without regard to benefits as between separate pieces within the district or the varying values of the bordering estates. Under this charter provision, special assessments had to be levied according to the front foot, irrespective of benefits (11).

Thompson had no actual notice (12, 65) of the reassessment made after the taking of his mortgage. The

amount levied against the property was, as already stated, forty-four per cent of the whole, or $14,262.68, to which would now be added 10 years of interest at 10 per cent per annum. He subsequently foreclosed his mortgage and took his deed in October, 1895, from the sheriff.

The present is a bill on his part to prevent the enforcement of the lien and to relieve the land of its cloud by perpetual injunction. The lower court held in favor of these contentions. All allegations of the complaint not specificially denied by the answer were stipulated to be considered as admitted (68). Appellant, without our consent and without notice to us, has omitted from the printed record a large part of the testimony, viz.: Exhibits B, 1, 8, 9, 11, 12, 16, 17, 21, 26. This omission makes it difficult to prepare our brief, and we do not see how this court can properly consider this case with these omissions from the printed record.

ARGUMENT.

Our subject seems to divide itself into two heads:

1. Could Hill himself, if still the owner, oppose this reassessment?

2. Even if Hill could not, may Thompson?

I.

Could Hill himself, if still the owner, oppose this reassessment?

It is not necessary to prolong this brief with a discussion which has occupied a good deal of space in the testimony, the discussion whether Hill actually dedicated the street, or whether he so acted as to be estopped from

denying that he dedicated it. The city has appropriated to its own use, without compensation to us, a strip of our land 66 feet wide and 2500 feet long—about 5 acres of land. Of this we do not complain in this case. But the city goes on and attempts to make an assessment against the rest of our property for the cost of appropriating this strip and opening it as a street, and charges up in that assessment the cost of planking the street in another part of the city. The city does this not only when there is no provision of law for such a proceeding, but when the law provides distinctly that the cost of such an improvement cannot be assessed against the abutting property. When any municipal authority so disregards the rights of property, it is taking from the citizen the rights guaranteed him by the 14th amendment to the constitution of the United States.

Even if we concede that the street was dedicated and turned over to the public in the fullest possible manner, it does not follow that the city could multiply charges upon it against the abutting property without regard to existing law or constitutional rights. I may invite a municipality to lay open a street or roadway, I may even dedicate that street or roadway to the public, yet from this it is not a consequence that I have invited them to proceed with improvements in a manner unjust to me or that my mouth is shut against their excesses. On the contrary, it may be fairly presumed that in inviting them to open a highway, I invite them to do so according to the statutes. (*Howell v. Tacoma*, 3 Wash. 715; *Grant v. Bartholomew*, 58 Neb. 839, 80 N. W. 45; *Birdseye v. Clyde*, 61 Ohio St. 27, 55 N. E. 169; *Smith v. Minto*, 30 Oregon 351, 48 Pac. 166; *City of Terre Haute v. Mack*, 139 Ind. 99, 38 N. E. 471).

It was contended, though not seriously, in argument

before the lower court, that it would be inequitable to permit Hill to petition the city to make these improvements and then to refuse to pay for them. When a man's land is assessed unlawfully or in an unconstitutional manner for street improvements, he may contest the validity of the assessment, although he was a petitioner for the improvement. Hill did not petition the city to lay sidewalks through his tract. He did not petition the city to plank the street through his tract or any other part of the street. You must bear in mind that there are two petitions (106, 148). In the petition Hill signed he was careful to say that his property did not abut on Weller Street, but on its extension. He merely petitioned that Weller Sreet be graded and extended through his tract. The other petition requested that the whole street up to his tract should be "opened, graded and sidewalked." Neither petition asked that the street or any part of it be planked. When the proceedings for the original improvement were first contemplated, it was not the intention to plank any part of the street. A contract had been let by the city by which certain bridges were to be built. Just previous to the death of Mr. Hill, in August, 1890, he heard that the city was about to change the plans of the street, by which the bridges were to be taken away and the street planked for the distance of about 1500 feet. When he heard of this proposed change by which the planking was to be put in, Mr. Hill protested against such change being made in the plans (103, 106). About two months after Hill's death the plans were changed by the city, and by this change of plans the street was planked for the distance of 1500 feet (96). The Supreme Court of the State of Washington decided (*Howell v. City of Tacoma,* 3 Wash, 715) that where a municipality acts unlawfully and without authority in making an assessment by the front foot, because some of the lands extended

back several hundred feet while others extended only one half of the distance back from the street, the petitioner for the improvement is not estopped from contesting the validity of the assessment.

See also *Birdseye v. Clyde*, 55 Northeastern (Ohio St.) 169, supra, where it was held that there is no estoppel against a petitioner for the improvement as against illegal assessment. The court in that case said that the petitioner had a right to suppose that the work would be done in conformity with law and not in violation of provisions of law.

So in this case, assuming that Hill threw the street open and invited an improvement too, what was the state of law under which he had a right to expect this work to be accomplished? The city was then under the old charter (4). (For a full copy of this charter see Session Laws Washington Territory, p. 238.) Under this (Section 7), the "clearing, opening, graveling, *planking*, and improving" of streets is a charge on general taxation. By the same charter (Section 8), "paving, grading and sidewalks" could be made a lien by the district plan upon abutting property. Of course, if "planking" in Section 7 is absorbed by "paving" in Section 8 of the charter, it might be said that planking could be made a charge upon the abutting property too; but, as is said by the Circuit Court (131-2), the latter does not include the former. Planking is not paving, but is a makeshift until paving can be accomplished.

We feel safe, therefore, in saying that planking was left by the charter of that period as a charge only on general taxation; that the cost of planking here, even if extended into the tract, could not have been charged against the abutting property, and that, as the planking never was made within a thousand feet of the tract but stopped 1500 feet from the bay, the planking could neither

in law nor in morals be made a charge upon nor deemed to be a benefit to this estate. But this is not all. The very ordinance (1285) that authorized the work gave authority for no such thing as planking, only for grading and sidewalking (53, 132).

Upon these facts themselves, it seems plain to us that Hill was in a position to defeat an assessment charging his property with the planking. But there is more. We must remember that the city, after beginning upon the plan as originally proposed, by which an elevated roadway should make an easy grade to Hill's tract, and after wasting some 98,000 feet of lumber in this project, abandoned it. It was abandoned and never resorted to again. Then the matter got into the courts, and the entire assessment under the old charter was defeated. Supposing Hill to have continued to live, he would now be confronted with a reassessment under the new charter. This reassessment would charge back to him the planking which never came within a thousand feet of his land, and had not even been authorized by ordinance.

To us, then, it seems clear that, judged even by statutory law alone, the original assessment was grossly wrong under the old charter and ordinance 1285. If this was so, the reassessment under the new charter and new ordinance was equally bad, because it obstinately adhered to the same ingredients of lien as the original, "the whole cost" being reassessed (11, 44). In other words the plainly improper planking became again a charge with this additional injustice, that the proportion charged against this tract was raised from 32 to 44 per cent of the whole cost (12, 44-5). As to reassessments, we concede that much irregularity and want of authority may be cured by them, through either contemporaneous or subsequent enactment, but as their retroactive effect is always justi-

fied by courts on the theory that the property has previously had the benefits, we deny the propriety or justice of reassessment here, when the subsequent planking never went into this estate or near it.

Nor can it be said that Thompson should have taken steps earlier to protect his rights. He never knew or heard of this reassessment against his property made in 1894 until several years after the reassessment was made. (65). Moreover, at the time he took his mortgage in 1892, nothing on the public records showed that the city claimed this strip of land as a street. On the contrary, the city was then taxing the 66 foot strip as private property, thereby announcing to the public that they did not claim the strip as a street. Moreover there was then no valid assessment of record against the property. It had previously been declared void by the courts (8). There was at that time no law in force authorizing the city to reassess for any assessment theretofore declared void. Relying upon the public records, Thompson invested $164,000 in the property, taking as his security this 100 acre tract, and taking as a part of this security this 66 foot strip, which the city at that time was treating as private property by taxing it as such.

When Thompson learned after the lapse of several years of this illegal and unconstiutional assessment against his land, he might have waited until suit was brought by the city to foreclose this assessment. But he did not wait. He availed himself of his constitutional rights by applying in this suit to the courts to prevent the city from commencing any such foreclosure suit, or from enforcing this alleged lien. When a man's land is unlawfully reassessed in an unconstitutional manner for street improvements, he need not take any steps, but may remain in possession of the land until after it is sold by the

city and then raise the question of the illegality or unconstitutionality of the tax in a suit in ejectment by the city or purchaser at the sale. This principle is laid down and ably discussed by Justice Ross (now U. S. Circuit Judge in the 9th Circuit) in *Mulligan v. Smith,* 59 Cal. 233. See also *Parker v. City of Detroit,* 103 Fed. Reporter 357, where no affirmative action was taken by the owner, but who raised the question after sale in a suit in ejectment based on the street assessment. See also *Howell v. City of Tacoma,* 3 Wash. 715, where the Supreme Court of Washington decided that though a man petitioned for the making of street improvements, yet he might contest their validity when made in an unlawful manner or without authority. The defect in those proceedings was that the assessment was made by the front foot when some of the lots extended back several hundred feet but others extended only half that distance from the street. In passing upon this question, the court in that case said:

"It (estoppel against the petitioner for the improvement could not be extended so as to estop one from asserting rights against such assessment when the common council had never had any jurisdiction of the proceedings *or had so far departed* from proper methods as to oust it of jurisdiction. In the case at bar we think that the proceedings clearly show such a departure from constitutional methods as to render them void, and for that reason respondent as a petitioner for the work is not responsible therefor or bound thereby."

See also *City of Terre Haute v. Meek,* Ind. 38 N. E. 471.

Nor is this a case in which it can be said that a certain part of the tax at least is due, but that, omitting the planking charge, we ought to pay or tender the rest. There is no separate charge apparent for the planking. It is impossible to say what is due without it. What the

cost of the planking is does not appear. But as is said by the trial court (132), it must be presumed that the cost of planking a strip 66 feet wide and 1542 feet deep is a considerable part of the whole cost. The rule of partial tender in resisting taxation is just, as well as practicable, where items are apparent, as where I am taxed on so many horses and so much household furniture, yet claim myself not liable on the former. But in a case like this we see no data for segregation, whether the whole tax (as in *Norwood v. Baker*) be regarded as wrongful, or whether one ingredient of it be clearly in violation of a charter or unsupported by an ordinance. (*Howell v. Tacoma*, 3 Wash. 711, *Norwood v. Baker*, 172 U. S. 269). This is not a case where it is conceded, either, that a part of the property is justly charged, as where I have several lots of which some receive the new improvements while others do not.

To resume, Hill's land was taxed by both the original and the second assessment for planking. This planking could not by the charter be made a special lien, nor was it ordered by the ordinance to be done, even if the charter had permitted it. Thus it violated statutory law. Then constitutionl law was violated also, for, supposing planking to be capable of being made a specific lien, we contend that to let that planking end 1000 feet from us and yet place us in a district with it, to bear the charge in comon with the residence quarter that alone received it, it is a gross and wilful inequality not necessary to be condoned by a court in order to support by precedents the useful policy of district improvements.

To see how great this inequality was, let us consider a moment. There are two degrees in which this property might have been made, theoretically at least, to receive *quid pro quo*. The planking might have been

brought to the edge of the tract, or it might have been brought not only to the edge but all the way through it too. Actually, either or both these might be of smaller benefit to it than the cost, but in theory the property holder would have cause to complain. By the former the tract would have been brought 1000 feet nearer in a practical sense to the main traffic, or so much more accessible in a region notorious for mud and rain. Remember, *the street itself had long previously been opened as far as the tract* (2), hence it cannot be said that, though the planking was not extended to it, the highway, at all events was. Thus he got nothing by the former of the two theoretical benefits. The other theoretical benefit would have occurred if the planking had not only reached the tract, but had gone all the way through it. The property, let it be borne in mind, was itself 2500 feet across (3). It was, in other words, almost as wide as the whole distance between its western edge and the bay, hence one half the whole street improvement district. But while it was thus one half of the district, it is preposterous to say that there was contributed either within it or reasonably near to it, any part of the principal improvement. Nevertheless a charge of forty-four per cent., or almost half, was placed upon this vacant tract and no more upon the residence portion outside, which received the principal benefit and was best able to respond.

What was the use of this? What friend of the district assessment plan can fairly say that this is a just application of it, or that if the court should annul this one, harm would be done to the principle in general? The writer of this brief has always favored this kind of taxation. I am unable to see, though, why two districts could not have been created here—one the planked district, the other the graded one. (See *Spencer vs. Mer-*

chant, 100 N. Y. 585.) This whole Weller Street proceeding discloses downright carelessness in the city officials. Nothing is plainer than by virtue of it the property on the west and settled end got a planked street by charging half the expense to a vacant tract of which the nearest portion was 1000 feet distant and the average of which was 2200 feet away.

This brings us to the celebrated case of *Norwood v. Baker,* about which there has been an extraordinary diversity of opinion. To part of the profession this was a very proper blow at the system of district improvements by the front foot, to the rest, a grossly erroneous decision, clearly overridden by later ones. To the writer of this brief, both these views seem to be wrong.

To us, *Norwood v. Baker,* seems to apply to this kind of taxation what before was admitted as to all taxation, that is to say, that when a tax reaches a point where it violates the principles of taxation itself, it ceases to be a tax and is mere confiscation. Let us conceive an instance under general taxation. That a government is the ordinary judge of the amount of a tax, and that general taxation constitutes a levy for the common support of government, is conceded to begin with, but suppose that in a time of profound peace and of economic surplus a government levies a tax of 100 per cent. of all values. This, it seems to us, would be confiscation, and would be arrested by a court. Or, since it is the law that taxation must be for purposes that are public, suppose a legislature levies taxation for the purpose of aiding some avowedly private enterprise. This would be no taxation, but mere confiscation, a taking their property from one set of citizens to give it to another. Now, these well established doctrines may find their illustration in the district plan. That a considerable latitude

ought to be given to those who arrange these districts is plain. Absolute equality is out of the question. But there may come a time (as we think occurred in *Norwood v. Baker*) when the inequality is so gross and apparent that the thing ceases to be district taxation at all. Then it can be arrested by a court on the ground, not that every district plan is bad, but that this one was.

In our own case, leaving out the violation of plain statutes involved here, we think there is such inequality as amounts to confiscation. Upon this point it is unnecessary to prolong our argument. The facts are before the court, and each case must of course stand upon its own statement. We saw that it was grossly unnecessary and unjust to include this vacant, unoccupied tract in a district which was to bear the expense of planking when that planking was extended only along the settled portion of the street, and was to stop a thousand feet from our own tract, vacant and wild.

This was not one of the decisions made in blind belief that *Norwood v. Baker* had annulled entirely the front foot plan. It was, on the contrary, rendered in June, 1901 after later decisions had corrected that misapprehension. Those later decisions distinguishing *Norwood v. Baker* and now reported in 181 U. S. were all read to the trial court in the final hearing. The opinion of Judge Hanford shows that he clearly understood the limitations while he applied the doctrines of *Norwood v. Baker*. The gross, unnecessary inequality of this district struck him so forcibly that he would have reached the same conclusion had the *Norwood* case never been decided, as did the Supreme Judicial Court of Massachusetts (*Sears v. Boston*, 173 Mass. 71,) where they remarked that the conclusions of the Norwood case were no more than what their own decisions had previously made clear. (See cases cited 2 Cooley Tax. 1209).

II.

Even if Hill could not avoid this reassessment, may Thompson?

It is apparent that Thompson has not only all the defenses that would have belonged to Hill, but others peculiar to himself.

The following things were clear at the time when Thompson took this mortgage upon this land. First, there was no existing assessment against it (8). Second, there was no law by which reassessment could be made (9). Third, for the purposes of general taxation, the city had ignored the street and up to the time of the taking of the mortgage taxed it as private property in bulk with the rest of the land (72). Fourth, the plat by which any street was or could have been dedicated to the public had never been put on record, and Thompson knew nothing of it (64). Fifth, Thompson took his mortgage by metes and bounds, and not by plat (8, 9). The most, therefore, that can be argued against Thompson is that he took his mortgage upon a piece of property which had a street cut into it, and that he may be presumed to have seen this street with his own eyes. But this street, even if he knew of its existence, might have been opened at private expense, or (if opened at public expense at all) out of the general funds of the municipality under the charter of that period (4, 5).

We have thus, we think, the case of a reassessment by *subsequent law* against an innocent purchaser.

We concede the following to be the law. Reassessments may be made to cure grave irregularities and defects of prior assessments. These reassessments may be made against two classes of persons, either against the original owner or against a subsequent purchaser for

value. Against the original owner reassessments may be made by virtue either of statutes existing when the original is made, and providing beforehand that all irregular or defective assessments may be reassessed, or by virtue of a law not then existing but called into existence for the express purpose of a cure. As to him, in other words, there is no ground for complaint that the method of curing the defects is by subsequent law. As to a new purchaser, also, reassessments can certainly be made if, at the time he purchases, there is in existence a law providing for reassessments. It matters not that at the time of his purchase the original assessment may have been plainly bad, or by some court declared to be bad, if, nevertheless, there then existed a statute which would allow the reimposition of the lien.

It is, however, when two things concur that district reassessment must fail. If there has been a transfer of title, and if, besides, the law to reimpose the assessment was not made until after the transfer, then the reassessment comes too late, and other doctrines much favored by our law rise superior to it.

The Supreme Court of the State of Michigan has laid down a rule of property—in refusing to recognize a vendor's lien—that no secret lien should be sustained in the state. Richards v. Shingle Co. (Mich.) 41 N. W. 860. (See Smith v. Allen, 18 Washington, 1, where the court says: "The policy of our registration system is against such liens. Here land is essentially a subject of trade and commerce, and purchasers and incumbrancers look to the record for their information."

Morever, nothing is more odious in American eyes than an attempt to disturb vested rights. While, therefore, much indulgence has been shown to curative statutes, and while, as between the original parties, consider-

able scope has been given to them, we think they have never been permitted to interfere with the rights of third persons whose investment has meantime been made in good faith. The learned Cooley, in discussing curative statutes, says:

"A subsequent *bona fide* purchaser cannot be deprived of property which he has acquired by an act which retrospectively deprives his grantor of the title which he held when the purchase was made. Conceding that the invalid deed may be made good as between the parties, yet if, while it remained invalid and the grantor still retained the legal title to the land, a third person has purchased and received a conveyance, with no notice of any fact which should preclude his acquiring an equitable as well as a legal title thereby, it would not be in the power of the legislature to so confirm the original deed as to divest him of the title he has acquired. The position of the case is altogether changed by this purchase. The legal title is no longer separated from equities, but in the hands of the second purchaser is united with an equity quite as strong as that which exists in favor of him who purchased first. Under such circumstances, even the courts of equity must recognize the right of second purchaser as best and as entitled to the usual protection which the law accords to vested interests." Cooley Constitutional Limitations, 3d Ed., —. 539-40. This opinion he fully sustains by numerous cases in his notes.

The foregoing was not uttered under assessment doctrines, but we think the same reason should apply. Nor do we think this court has ever let fall what would give rise to any other opinion. In sustaining the right of reassessment in *Williams v. Board of Supervisors,* 122 U. S. 154, you were careful to add of defective proceedings: "Their omission or defective performance may be cured by the same authority which directed them, *provided, always, that intervening rights are not impaired.*"

Accordingly, in examining cases that sustain reassessments, two things must always be borne in mind. First,

are they reassessments against only the original owner? Secondly, if they are cases in which the property has changed hands, yet at the time of purchase, was there already existing a law for reassessment? We do not believe there will be found a case—certainly we do not think there will be found one that would appeal to the mind of this court—in which, not only has the property changed hands, but the law which seeks to reimpose the burden was not called into existence until afterwards. We have found one or two under *general* taxation (*Tallman v. Janesville*, 17 Wis., 51; *Cross v. Milwaukee*, 19 Wis., 509), but non were district assessments, to which we shall apply what seems a plain distinction.

What hardship can result to the state from the principle which we invoke? Looking at the thing from a practical standpoint, almost none. In nearly every state in the Union there now exists a law providing for reassessments. No transfer of interests, therefore, will, according to our reasonable contention, avoid in future any burdens which the states may seek to reimpose. It would be better to sustain the rights of an innocent purchaser like Thompson, than to give any encouragement to doctrines that, in other fields of inquiry, might impair the obligation of a contract, might deprive one of property without due process of law, might deny him the law of the land. These considerations appear to us not to be sentimental, but, on the contrary, to be reasonable, only bare justice to Thompson. The city now seeks to reimpose a very considerable tax, of which there was not only no notice to Thompson, but which had been declared invalid by the courts. Nay, more. The advice of his counsel at that time must have been, if indeed there was anything to suggest liability, that not only was this lien dead, but that it could not be revived, that is to say,

that there was no law in existence by which it could be recreated.

It seems to us an opposite argument is opposed to public policy. If the state can reimpose a tax by subsequent legislation against new purchasers, what time or limit shall be set to its action? Where there is already a law, the owner of the property, in seeking to dispose of it, may make calculations with his vendee, and sums may be reserved or set aside in some fashion or other to provide against the contingency. The reserved power of reassessment, even under statutes already existing, is no small hamper to the transfer of property and tends to impede sales, but when we go farther, and say that even after these transfers new statutes may be passed, what arrangement can possibly be made by the vendor and vendee? There is no law existing at the time by which the vitiated assessment can be recreated, so it is doubtful whether, in the contentions of legislatures, any such law ever will be passed, but worst of all if it can be passed at all, there is no telling how many years the legislature may suffer to lapse before they will pass it. Against their right to pass it, if they have the right at all, there is, it is plain, no statute of limitations. Pre-existing laws for reassessment, on the other hand, will naturally impose upon themselves a period. There is a time within which vendor and vendee know that action must be taken, and against this the devices of contract, though burdened and annoyed, may probably provide. Against subsequent enactments, however, ingenuity is of no avail, because no one knows whether they ever will be passed at all, or within how many years.

The lien here resisted was a secret one. This seems to us not true of liens reassessed under laws existing before the new purchaser comes in. There he buys with

the knowledge that the state has already asserted the right, though it has not yet exercised the intention. As against subsequent laws, the purchaser may well protest that at the time he bought, the state had not even asserted a right. The state should be estopped, as it was in a certain case where its officers had erroneously discharged a tax of record on the faith of which a transfer was made. *Curnen v. New York*, 79 N. Y. 511.

We do think that in the present instance a difference of $15,000, which represents what was then approximately this tax, might have made a great difference between these parties, and that the burden of it now must presumably fall upon the vendee, Thompson, and his heirs alone, if he is to be bound by a statute passed since his investment. In speaking of his investment we of course refer to the date of his mortgage, and presume it is not necessary to cite to this court that his subsequent acquisition of the fee will relate to that time.

We have said that in considering this case the court ought to protect the innocent purchaser, rather than lay any precedent which in parallel fields of reasoning might endanger the sacred doctrines of vested rights. It may, on the other hand, be suggested that the court is likewise under duty to decide here nothing that would impair the equally salutary principles of taxation. To this we accede. We think, however, the case can be decided in favor of the innocent purchaser, without any danger whatever to the sovereign right of taxation. Let us see. That the system of district improvements is a branch of the law of taxation, we at once admit, to begin with. District assessments are a tax, but while they are a tax, it is perfectly clear that they are not a tax in the sense in which the tax is generally understood. Cooley calls them "a peculiar species of taxation, standing aprt from the

general burdens imposed for state and municipal purposes, and governed by the principles that do not apply universally." (Taxation, 3d Ed., Chap. XX, p. 1153). The many learned authorities which he cites may be glanced at with some benefit, as showing how universal is the opinion that this system of levies, while classified under taxation, is viewed differently by the courts in its collision with the rights of individuals. Our liability to general taxation attaches to us at birth, may in times of necessity involve even our bodies, and cannot be shaken off by anything less than death or exile. It promises no specific return for the burdens imposed, and notice, though commonly given, cannot be required of its exactions. How different in the case of district assessment. It cannot be levied, and no state has ever tried to levy it, without some form of notice, particular or general, private or published. (*Scott v. Toledo*, 36 Fed. 385; *Paulsen v. Portland*, 149 U. S. 30). Far from being able to depend upon vague or general return through the public good, it depends for its very existence upon a specific benefit bestowed. It is even less an attribute of sovereignty than the power of eminent domain, which arbitrarily determines to take from a man his property without any benefit whatever in return except the compensation which a court may adjudge.

It must be perfectly apparent that while we may, for convenience, call the district assessment plan taxation, it is to be judged by principles wholly different. It must, theoretically at least, propose to the property taxed a benefit fairly demonstrable. It must, in the second place, originate in some form of notice. Now, that which depends upon notice for its creation may well depend upon notice for its existence also. What harm is done to the district assessment plan, as a general scheme of public good, and as even a branch of the law of taxation, if,

since it must be founded upon a notice, we should contend that anything which once cleared the title, so that an investor could fairly be said to purchase without notice, would relieve the estate of the lien? Were such a decision to be made in this case of district assessments, we do not see how it could, with any plausibility, be made harmful to general taxation. Certainly it would be far better to impose this fair restraint upon this system of things, than to say that when a person invests his money under the circumstances in which Thompson did, a secret lien can, by subsequent statute, be brought to light and reimposed, where the lien had already been annulled by the courts, where no statute existed for its recreation, where the property had recieved, as the trial court says (133), "little or no benefit," where there was no warrant in ordinance at all for a portion of the work, and where the state, or its agent, the city, had already misled the purchaser by assessing for general taxation as vacant acreage that which it afterwards claims is an adopted street and subject to liens for improvement.

We respectfully submit that the judgment of the lower court should be affirmed.

FREDERICK BAUSMAN,
DANIEL KELLEHER,
G. MEADE EMORY,
Solicitors for Appellee.